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Supreme Court of the United States

October Term 1942.

No. 412.

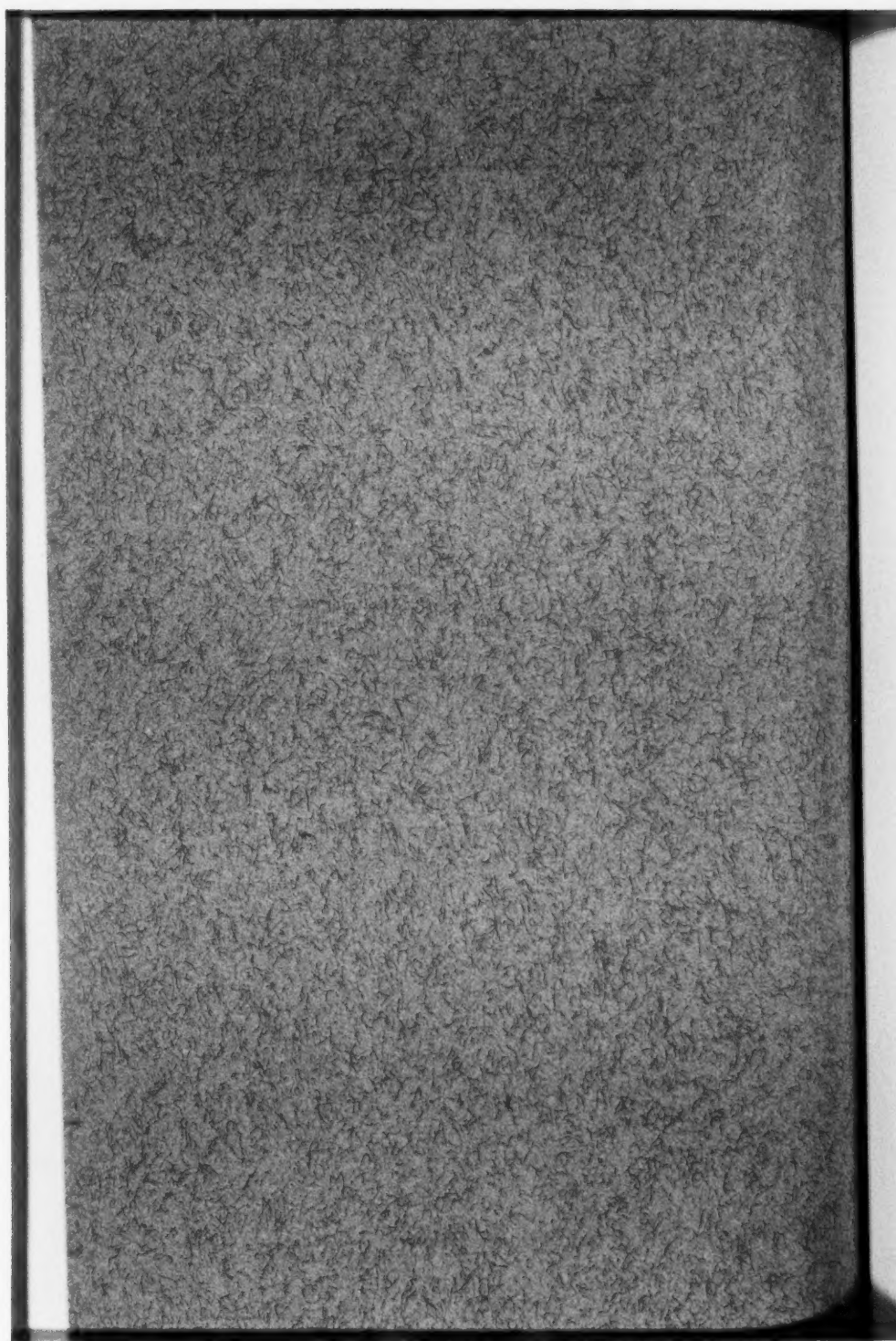
ERVIN HOWELL AND RAYMOND EARL GUTERMUTH,
Petitioners and Appellants below,

ROYDEN O. COUCH, doing business as Couch Manufacturing
Company, *Respondent and Appellee below.*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF HABEAS CORPUS.

CHARLES R. FENWICK,
Counsel for Respondent.

HOLLIS RINEHART, JR.,
Of Counsel.



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ERVIN HOWELL AND RAYMOND EARL GUTERMUTH,
Petitioners and Appellants below,

v.

ROYDEN O. COUCH, doing business as Couch Manufacturing
Company, *Respondent and Appellee below.*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

PETITIONERS' POINT A.

The Court of Appeals for the Fifth Circuit has sustained as valid and infringed a patent which will now dominate the entire industry, confined wholly within the State of Florida, thus making improbable any future litigation involving the patent before any other Federal Court of equal dignity—

Petitioners, without any support from the record, give the impression the only manufacturers of pumps for drainage and irrigation reside in the State of Florida and are controlled by the decision of the Court of Appeals for the Fifth Circuit. This is wholly untrue as shown by the affidavit of Royden O. Couch, respondent in this case:—

"AFFIDAVIT.

City of New York, State of New York, ss

ROYDEN O. COUCH, being duly sworn, deposes and says that he is a citizen of the United States and a resident of Grant, Florida, that he is respondent in the petition of Ervin Howell and Raymond Earl Gutermuth for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit, Civil Action No. 412;

That to his own knowledge the problem of low head pumping both for irrigation and drainage is not confined to the territory within the jurisdiction of the Fifth Judicial Circuit, but is widespread throughout the United States, particularly in California and those other parts of the far West where irrigation is practiced, and in connection with flood control projects which have been established on rivers in Pennsylvania, West Virginia, Ohio, Kentucky and other Eastern states;

That he knows either personally or by reputation that a large number of manufacturers in different parts of the United States outside of the Fifth Judicial Circuit are engaged in the manufacture and sale of pumps for irrigation and drainage, and that among such manufacturers are the following, all of whom are located outside of the Fifth Judicial Circuit:

Kimball-Crogl, Los Angeles, Calif., ROC.
 Mills-Chalmers Co., Milwaukee, Wis., ROC.
 Byron-Jackson Co., E. Slauson & Thomas Aves., Los Angeles, Calif.
 Victor Equipment Co., Kimball-Krogh Pump Div., 1010 E. 62d St., Los Angeles, Calif.
 Pomona Pump Co., Pomona, Calif.
 Aurora Pump Co., 510 Loucks St., Aurora, Ill.
 Fairbanks, Morse & Co., 606 So. Mich. Ave., Chicago, Ill.
 Frederick Iron & Steel Co., Frederick, Md.
 Lawrence Pump & Engine Co., Box 70, Lawrence, Mass.
 Worthington Pump & Machinery Co., 426 Worthington Ave., Harrison, N. J.
 Quimby Pump Co., Inc., 344 Thomas, Newark, N. J.
 Morris Machine Works, 20 E. Genesee, Baldwinsville, N. Y.

Trench & Marine Pump Co., Inc., 130 West 22d St.,
New York, N. Y.

Goulds Pumps, Inc., 75 Falls St., Seneca Falls, N. Y.

The F. E. Myers & Bro. Co., 80 - 4th St., Ashland,
Ohio.

Economy Pumps, Inc., Weller & Zimmerman Aves.,
Hamilton, Ohio.

Link-Belt Company, 2049 W. Hunting Park Ave.,
Philadelphia, Pa.

W. F. Stuckeman & Co., 202 Lemoyne Ave., Pitts-
burgh, Pa.

Lawrence Machine & Pump Corp., 363 Mkt. St.,
Lawrence, Mass.

That the irrigation and drainage pumps made by
said manufacturers are in the same competitive line
with the pumps made by the respondent, the extent of
whose manufacture of such pumps does not exceed 5 per
cent of such pumps manufactured in the United States.

ROYDEN O. COUCH.

Sworn to and Subscribed before me this 6th day of
October, 1942.

(Seal) CHARLOTTE R. HAUSER,
Notary Public.

Notary Public, Bronx Co. No. 30, Reg. No. 88H43.
Cert. filed in N. Y. Co. No. 491, Reg. No. 3H337.

My Commission expires March 30, 1943."

It is obvious from this that there is every opportunity for
litigation to develop elsewhere with resulting conflict of de-
cision permitting normal procedure and the application of
the usual rules.

Petitioners attempt to bring the case within the doctrine
of *Schriber Schroth Co. v. Cleveland Trust Company*, 305
U. S. 47, and other cases cited; but no similar state of facts
exists in the instant case. Petitioners are not innocent in-
fringers but imitators, having been trusted employees (R.
102) who deliberately entered the field, making respondent's
exact commercial structure (R. 80).

PETITIONERS' POINT B.

The Court of Appeals has sustained the validity on the presumption of validity attaching to the grant; doubtful proof of commercial success and differences over an old device in having a plurality of selective control inlets in place of one, and thus rejected this court's criterion of patentable invention.

The court below did not rely solely on the presumption of validity attaching to the grant but on convincing evidence.

Respondent, an engineer, became interested in the great farming loss due to lack of water control in the Everglades region of Florida. He found Lake Okeechobee, lying at the head of the Everglades, serving as a great shallow basin and a vast peat and muck blanket covering the territory known as the Everglades. Large drainage ditches extended from Lake Okeechobee through this area with connecting ditches or canals, presenting the problem of making available a supply of water for irrigation during certain periods and drainage during others, with certain fields requiring a higher water table than others. Farmers were losing hundreds of crops from either too much or too little water and they didn't average more than one out of every ten planted (R. 18).

Creech, farmer and supervisor of the shore drainage district comprising four thousand acres, testified he commenced farming in 1919 and that since 1935, when his farm became completely Couch pump controlled, he had not lost a single crop from too much or too little water and that if it were not for the Couch pump very few would be farming in the Everglades today (R. 18).

Stuckey, a farmer of twenty-five years experience in the Glades, and who farms three thousand acres of reclaimed Pelican Bay bottom lands five foot below the Lake Okeechobee water table, stated he and other farmers were at the mercy of the elements until the Couch pump was installed.

When asked what part the Couch pump played in his own experience he said:

“Well personally, I think the Couch two-way pump is an answer to a maiden’s prayer. We think we can’t get along without them.” (R. 26)

Respondent, an individual, saw the need, solved the problem, personally financed the manufacture of the pump and made it possible for farmers in the Everglades to survive. With little or no advertising, the sale of the Couch pump has steadily increased, representing a dollar value of more than \$243,000.00 (R. 42). This is the very type of invention courts like to protect—an individual divorced from big business, seeing the need, solving it, and benefiting mankind.

The respondent was the first to pump water off or on the land by making a high and low body of water accessible to the inlet side of the pump through selectively controlled inlet gates and making the outlet of the pump accessible to the high and low bodies of water through selectively controlled outlet gates so that by adjusting the outlet gates direct unimpeded gravitational flow may be established between the high and low bodies, while at the same time, by adjusting the inlet gates and starting the pump, the gravitational flow may be supplemented by pumping. *This was a new concept and principle* from the prior art, the prior pumps being adapted to pump onto the land, relying solely upon gravity to drain the land, or in pumping off of the land by bodily transpositioning the pump from the high to the low body of water.

Petitioners are completely in error when they state that—

“The only differences over the old device is the provision of a plurality of selectively controlled inlets in place of one.”

Petitioners rely on the patents to Gill and Grunow in support of this statement. These were considered by the Patent Office, the District Court and the Circuit Court of

Appeals and discarded as failing to show the same mode of operation as is present in respondent's patent.

Petitioners after making the above quoted statement point out at least four structural differences, but the important point is that the mode of operation is entirely different, Grunow relying on the water being pumped onto the land and gravitational flow back down through the pump under which arrangement the volume of water discharged can never be supplemented beyond the gravitational flow, whereas with respondent's structure the water always flows up through the pump and the gravitational flow can be supplemental by pumping, under all conditions.

The patent to Gill teaches nothing more than the designing of an efficient impeller.

"It is, of course, urged, and naturally, that no more than a mechanic's skill was needed to take the final step. But a mechanic is one who applies his trade by rule or rote, and only uses what he learned yesterday to do the work of today in the same old manner. He may do it excellently, but if he has, not only hindsight, but insight of foresight, first to comprehend the problem and use even the learning of yesterday to do the new thing in a new way, that mechanic has usually earned the inventor's title." *A. Kimball Co. v. Noestring Pin Ticket Co.*, 262 F. 148.

Mechanical skill cannot be advanced to create a different mode of operation.

PETITIONERS' POINT C.

The Court of Appeals has applied the doctrine of equivalents in conflict with decisions of this court.

It is submitted that Claim 2 which both the District and Circuit Courts found to be valid and infringed, reads squarely on petitioners' structure without applying the doctrine of equivalents. It is fundamental that a patent, like any other written instrument, is to be determined and interpreted by its own terms. *Goodyear Dental Vulcanite Company v. Davis*, 102 U. S. 220, 26 L. Ed. 149.

Claims as finally allowed speak for themselves where they are in plain language and the interpretation of this language is not in doubt. Neither the District nor Circuit Courts found it necessary to apply the doctrine of equivalents, but found the language of Claim 2 to clearly read on petitioners' structure. Petitioners create this issue out of thin air,—they set it up as a straw man in order to knock it down.

Petitioners have copied respondent's commercial structure and admit that if the claim reads on respondent's commercial structure then petitioners' structure is an infringement (R. 80). The record shows clearly without resorting to equivalents or otherwise, that the claim reads on both structures (R. 71, 75).

Since the court has not applied the doctrine of equivalents, there can be no violation of the Supreme Court rule.

Claim 12, now renumbered Claim 4 in the patent, is an original claim which has never been cancelled; and 13, 14 and 15, now numbered 1, 2, and 3, are directed to the same subject matter so that there has been no lapse of time between the cancellation and insertion of any claims which precludes any contention of dedication or abandonment of the subject matter of the claims.

PETITIONERS' POINT D.

The Court of Appeals in refusing to give weight to public use testimony of Anderson because it rested on his sole testimony has rendered a decision in direct conflict with applicable decisions of this Court.

Public use is a question of fact. The District Court had an opportunity to hear and see Anderson; the Circuit Court carefully examined his testimony and rejected it, not solely because it was uncorroborated, but as expressed by the court:

“We do not give weight to the model and the public practice attributed to Anderson just prior to the time Couch claims to have made his invention. It rests sub-

stantially on Anderson's sole testimony as to time, and his testimony was not by the trial judge who saw him considered convincing. To us also it seems vague and inconclusive."

Obviously the Circuit Court has not violated any rule of this Court when it rejects the testimony of Anderson as being "vague and inconclusive".

The trial court in its findings of fact (R. 186) pointed out many discrepancies in Anderson's testimony, calling it "uncorroborated, nebulous and unsatisfactory and falling far short of the degree of proof required in cases of this sort".

CONCLUSION.

Petitioners have presented no legal question for consideration by this Honorable Court which warrants the granting of their petition. Although they have selected certain cases in which certiorari has been granted and attempted to pitch the issue in conformity with such cases, no such grounds exist in the case at bar, and for the most part the petitioners complain of facts found by the trial and circuit courts which are usually not reviewed by this court under its rules.

Respectfully submitted,

CHARLES R. FENWICK,
Counsel for Respondent.

HOLLIS RINEHART, JR.,
Of Counsel.

